

No. 10424

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN O. ENGLAND, Trustee of the Estate of
James Nyhan, Bankrupt,

Appellant,

vs.

DAVID NYHAN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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(Copy)

In the Southern Division of the United States District Court for the Northern District of California.

No. 34467-R

In Bankruptcy

In the Matter of

JAMES NYHAN, also known as JAMES P. NYHAN, also known as JAMES PAUL NYHAN, also known as DICK NYHAN,
Bankrupt.

**CERTIFICATE AND REPORT OF REFEREE
ON PETITION FOR REVIEW OF REFEREE'S ORDER SUSTAINING PLEA TO JURISDICTION AND QUASHING ORDER TO SHOW CAUSE .**

To Honorable Michael J. Roche, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court, and the referee in charge of this proceeding, respect- [1*] fully certify and report:

There has been filed herein, on behalf of the trustee in bankruptcy, the following verified petition for review:

* Page numbering appearing at foot of page of original certified Transcript of Record.

“The petition of John O. England respectfully shows:

“1. That your petitioner is the duly elected, qualified and acting Trustee of the above named bankrupt;

“2. That heretofore and on the 10th day of November, 1942, your petitioner filed herein a verified petition for an order authorizing your petitioner to sell a certain taxi license or permit standing in the name of the above named bankrupt permitting the holder of said taxi license or permit to operated eight taxicabs in the City and County of San Francisco, State of California, free and clear of any claim of David Nyhan, alias, and an order to show cause issued thereon and served on said David Nyhan, which order to show cause and petition was returnable before the above entitled court on the 2nd day of December, 1942, and was duly and regularly continued from said date for hearing to the 9th day of December, 1942, and that said respondent David Nyhan served and filed his answer objecting to the summary jurisdiction of the above entitled court and requesting an order quashing service of the order to show cause;

“That thereupon a minute order was entered on the 9th day of December, 1942, sustaining the plea to the jurisdiction and quashing the order to show cause, and that thereafter, on the 11th day of December, 1942, an order was entered sustaining the plea to the jurisdiction and

quashing the order to show cause, in words and figures [2] as follows:

“ ‘In the District Court of the United States
for the Northern District of California,
Southern Division.

No. 34467 R

In the Matter of JAMES NYHAN, also
known as JAMES P. NYHAN, also
known as JAMES PAUL NYHAN, also
known as DICK NYHAN,
Bankrupt.

**ORDER SUSTAINING PLEA TO JURIS-
DICTION AND QUASHING OF OR-
DER TO SHOW CAUSE.**

The verified Petition of John O. England, the Trustee, for an Order to Show Cause directed to Respondent, David Nyhan, and the verified objection of said David Nyhan to the summary jurisdiction of the Court and praying for an order quashing service of the Order to Show Cause coming on regularly for hearing this 9th day of December, 1942, and the trustee appearing by his attorneys, and the respondent appearing by his attorney, and the Trustee having offered oral and documentary evidence upon the plea to the jurisdiction of the court and thereupon having rested and thereby submitted to the court the said plea to jurisdiction for its decision, the court thereupon being fully advised, duly made its

minute order sustaining said plea of said respondent to the jurisdiction of the above entitled Court;

It Is Hereby Ordered that pursuant to the minute order heretofore made by the above entitled court, the plea of respondent, David Nyhan, objecting to the summary jurisdiction of the above entitled Court be, and the same is hereby sustained and service of the Order to Show Cause issued by the above entitled Court directed to said respondent be, and the same is hereby quashed.

Dated the 11th day of December, 1942.

BURTON J. WYMAN,

Referee in Bankruptcy'

“That said order is erroneous for the following reasons:

“That said order is contrary to the facts and law in that the uncontroverted evidence shows that prior to the filing of the petition in bankruptcy, which said petition was filed on November 17, 1941, said bankrupt attempted to assign and transfer said taxi license or permit to his brother David Nyhan, alias, said respondent; that under the provisions of the ordinances of the City and County of San Francisco, said license is transferable only with the consent of the Police Commission of said City and County, and that upon the 10th day of November, 1941, an application was made by respondent David Nyhan, alias, and said

bankrupt pursuant to said municipal ordinance of the said City and County of San Francisco, to the Chief of Police and the Police Commission of said City and County for an order permitting said transfer and assignment of said permit, and the certificate for said permit was filed with said Chief of Police of said City and County with said application;

“That thereafter and subsequent to the filing of the petition in bankruptcy said Chief of Police and Police Commission denied and refused to permit the transfer of said taxi permit and license and that the same was redelivered by said Chief of Police to said bankrupt and his receipt obtained therefor;

“That thereafter an appeal was taken by said David Nyhan, alias, said respondent and said bankrupt, to the Board of Permit Appeals of the City and County of San Francisco, which said board thereafter sustained said ruling denying the transfer of said permit;

“That the Referee’s order on the foregoing facts denying jurisdiction for the summary order requested by the trustee to sell free and clear of any claim of David Nyhan, alias, said respondent, is contrary to the law in that said taxi permit or license at the time of the filing of the petition in bankruptcy was in the possession of the bankrupt and was an asset of the estate and there- [4] fore subject to the summary jurisdiction of the Referee;

“That the order of the Referee sustaining the objections to the summary jurisdiction of the Referee, cannot be sustained in law on the evidence adduced.

“Wherefore, your petitioner prays for a review of the said order by the Judge of this Honorable Court, and that said order be vacated and set aside, and that the Referee be directed to enter an order denying the plea of the respondent to the jurisdiction of the Referee, and to decide the controversy on its merits and in accordance with the facts and law.

“JOHN O. ENGLAND,

“JOHN O. ENGLAND,

Petitioner.

“B. H. MULDARY,

“DINKELSPIEL &
DINKELSPIEL,

“DINKELSPIEL &
DINKELSPIEL,

“Attorneys for Trustee.”

[Verification omitted for sake of brevity.]

(See original of said petition, handed up herewith as a part of this certificate and report.)

The verified petition referred to in said petition for review reads as follows:

“Comes now John O. England, and respectfully represents:

“That on or about the 17th day of November, 1941, an involuntary petition in bankruptcy was filed in the District Court of the United

States for the Northern District of California, Southern Division, against Respondent James Nyhan, also known as James P. Nyhan, also known as James [5] Paul Nyhan, also known as Dick Nyhan, and that thereafter such proceedings were had that on or about the 11th day of June, 1942, said James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, was duly adjudged to be a bankrupt in accordance with the provisions of the Acts of Congress relating to bankruptcy, and that thereafter and or about the 20th day of August, 1942, your petitioner was duly appointed as Trustee of said bankrupt's estate, and thereupon duly qualified as, and has since been and now is the duly appointed and acting Trustee of the estate of the above-named bankrupt.

“That your petitioner is informed, believes, and therefore represents that on and before said 11th day of November, 1941, at the time said petition in bankruptcy was filed in said district as aforesaid, the above-named bankrupt was the owner of and entitled to the possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California, under and by virtue of the Ordinances of said City and County of San Francisco, authorizing and permitting said bankrupt to operate eight taxi cabs for hire on the streets of said City and County

and State, naming James Nyhan, doing business as 'California Cab Co.' as licensee.

"That your petitioner is informed, believes, and therefore represents, that Respondent David Nyhan, claims an interest in said above-described taxi license but that as a matter of fact, has no such interest in law or equity.

"That said Respondent David Nyhan and Respondent bankrupt have joint possession and control of said above-described taxi license, and that Respondent David Nyhan now holds possession of said taxi license as agent and or [6] trustee for said Respondent bankrupt.

"That by reason of the premises your petitioner is informed, verily believes, and therefore represents, that the said personal property was, at all times herein mentioned and still is, a part of the assets of the estate of said bankrupt and subject to administration herein as part of said estate.

"That your petitioner represents that unless this Honorable Court enter its temporary restraining order herein forbidding any transfer or encumbrance of that certain personal property above-described by the said Respondent, until this matter is finally determined by this Court, that said personal property will be forever lost to this bankrupt estate.

"Wherefore, your petitioner prays for an Order authorizing and directing him as Trustee, to administer upon and to sell, in the manner prescribed by law, said above-described taxi

license, as part of the assets of the estate of the bankrupt above-named free and clear of any property liens, claim, right, title, or interest of said Respondents; and that pending the hearing of this petition and until this matter is finally determined by this Court the Respondents, and each of them, be restrained from transferring or encumbering said personal property and for such other and further order and or relief as may be meet and proper in the premises.

“Dated: This 10th day of November, 1942.

“JOHN O. ENGLAND,

“JOHN O. ENGLAND,

Trustee.

“DINKELSPIEL & DINKEL-
SPIEL,

“DINKELSPIEL & DINKEL-
SPIEL,

“Attorneys for Trustee.” [7]

[Verification omitted for sake of brevity.]

(See original of said last mentioned petition, handed up herewith as a part of this certificate and report.)

The order to show cause, also referred to in said petition, avers:

“Upon consideration of the annexed duly verified petition of John O. England, Trustee herein, for an Order authorizing the sale of personal property and good cause appearing therefor, now on motion of Messrs. Dinkelspiel

& Dinkelspiel, Attorneys for said Trustee herein, it is hereby

“Ordered, that James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, and David Nyhan, and each of them, do personally be and appear before the undersigned Referee in Bankruptcy at the office of Burton J. Wyman, Room 604, Grant Building, at San Francisco, California, in said District, at the hour of 2:00 o'clock P.M. on the 17th day of November, 1942, then and there to show cause, if any, or each of them and why the prayer of said annexed Trustee's petition should not be granted; and it is further

“Ordered, pending the hearing of this Order to show cause and until further ordered of this Court, the Respondents and each of them, are hereby restrained from in any way selling, transferring, on encumbering the personal property described in said annexed petition; and it is further

“Ordered, that service of this Order be made by delivering to said Respondents, and each of them, a duly [8] certified copy of this Order, together with a true copy of said annexed Trustee's Petition, at least 2 days prior to the aforesaid hearing hereof.

“Dated: This 10 day of November, 1942.

“BURTON J. WYMAN,

“Referee in Bankruptcy”

(See original of said order, handed up herewith as a part of this certificate and report.)

On December 5, 1942, there was filed on behalf of the respondent, David Nyhan, the following verified plea to the Court's jurisdiction:

"Now comes, David Nyhan, of the City and County of San Francisco, State and District aforesaid, Respondent to an order to show cause issued by the above entitled Court on the 11th day of November, 1942 and returnable on the 2nd day of December, 1942 and continued until December 9, 1942, and appearing specially and not otherwise for the purpose of objecting to the summary jurisdiction of the above entitled court and moving said court for an order quashing the service of said order to show cause, and for grounds of his plea objecting to the jurisdiction of the above entitled court alleges:

"1. That it affirmatively appears from the petition of the Trustee, John O. England, upon which said order to show cause was issued by the above entitled court, that the above entitled court was and is without jurisdiction to hear and determine the matters therein stated or to make [9] any order against the respondent therein named except by consent of this respondent, and that this respondent has never consented to submit himself to the jurisdiction of the above entitled court, but, on the contrary, this respondent has declined and does decline to

submit himself to the jurisdiction of the above entitled court to hear and determine any of the matters set forth in said Trustee's petition or be subjected to any orders of the above entitled court pertaining to any of the matters set forth in said Trustee's petition.

"2. That it affirmatively appears from the face of said Trustee's petition and the order to show cause issued by the above entitled court, that the facts stated in said Trustee's petition do not confer upon the above entitled court summary jurisdiction over said respondent without his consent.

"3. That it affirmatively appears from said trustee's petition, upon which said order to show cause was issued, and from said order to show cause, that the issues which the Trustee seeks to submit to the above entitled court as grounds for the granting of the prayer of said petition can only be determined in a plenary action and not in a summary proceeding instituted by said Trustee herein, and it affirmatively appears from said petition that no summary jurisdiction can be exercised by the above entitled court as it relates to this respondent, without the consent of this respondent.

"That this respondent is entitled to have said issue determined in a plenary action and to have a trial by jury of the issues raised in said petition pursuant to his demand.

"For a further, separate and distinct objection [10] to the summary jurisdiction of the

above entitled court, this respondent alleges as follows, to-wit:

“That before the petition in involuntary bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, the Respondent, David Nyhan, was and now is the owner and entitled to possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California and mentioned in the Trustee’s petition.

“Any interest of the Bankrupt, James Nyhan, by reason of the issuance thereof in said Bankrupt’s name in said taxi license is held in trust by said Bankrupt for respondent, David Nyhan.

“Respondent further alleges that the said Bankrupt, James Nyhan, has no ownership in said taxi license nor the possession thereof, and that said taxi license at no time was and not now is a part of the assets of said bankrupt’s estate.

“Respondent alleges that any order granting the prayer of the Trustee herein would be in excess of the jurisdiction of the above entitled Court.

“Wherefore, Respondent prays that service of the order to show cause issued by the above entitled Court may be ordered quashed on account of lack of jurisdiction of the above en-

titled Court to have issued said order to show cause.

“DAVID NYHAN,

“David Nyhan, Respondent”

[Verification omitted for sake of brevity.]

[11]

(See original of said “plea”, handed up herewith as a part of this certificate and report.)

When the aforesaid petition for order authorizing sale of the said personal property finally came on for hearing, on December 9, 1942, I was attended upon by Ernest J. Torregano, Esq., representing Messrs. Torregano & Stark, the attorneys for the bankrupt; Martin J. Dinkelspiel, Esq., representing Messrs. Dinkelspiel & Dinkelspiel, which said law firm, with B. H. Muldary, Esq., (who also was present), are the attorneys for the trustee, Phillip S. Matthews, Esq., the attorney for certain creditors, and Bernard Nugent, Esq., the attorney for the respondent, David Nyhan.

During the course of the aforesaid hearing, the following proceedings were had:

“The Referee: You may proceed with the Order to Show Cause in the Nyhan matter.

“Mr. Dinkelspiel: I might state, if the Court please, that in accordance with Your Honor’s order, an answer was filed. I don’t know whether or not Your Honor has read it, but it is a plea to the jurisdiction.

“The Referee: Yes, I have read it.

“Mr. Muldary: If the Court please, at this time I would like to introduce in evidence a section I have here of the San Francisco Municipal Code, codified in 1939, introducing in evidence Section 1079 of the Police Code, which is the portion of the Police Code which has to do with the granting of applications for taxicab licenses and particularly I call the Court’s attention at this time to that sentence in Section 1079 which provides: [12]

“‘All such permits or licenses granted hereunder shall be transferable only upon the consent of the Police Commission after written application shall have first been made to said Commission and upon payment of the fee required of the new applicants.’

I should like permission to introduce the Police Code in evidence and have the court reporter copy this section and then withdraw the volume.

“‘Police Code. Section 1079. Continuous Operation—Revocations Provided For. All persons, firms, or corporations within the purview of Sections 1075 to 1081 inclusive, of this Article shall regularly and daily operate his or its licensed motor vehicle for hire business during each day of the license year to the extent reasonably necessary to meet the public demand for such motor vehicle for hire service. Upon abandonment of such business for a period of ten (10) consecutive days by an owner or operator, the Police

Commission shall, after five (5) days' written notice to the said owner or operator, direct the Police Department of the City and County of San Francisco to revoke said owner's or operator's licenses or permits, and said licenses or permits shall forthwith be revoked. All such permits or licenses granted hereunder shall be transferable only upon the consent of the Police Commission after written application shall have first been made to said Commission and upon payment of the fee required of the new applicants. Any and all such certificates [13] of public necessity and convenience, permits and licenses and all rights herein granted may be rescinded and ordered revoked by the Police Commission for cause.'

I would like to call James Nyhan.

“JAMES NYHAN

Called for the Trustee, sworn.

“The Referee: This is strictly on the question of the plea to the jurisdiction?

“Mr. Dinkelspiel: Yes, Your Honor.

“Mr. Muldary: Q. What is your name?

“The Witness: A. James Nyhan.

“Q. Where do you reside?

“A. 1080 Eddy.

“Q. You are the bankrupt in this proceeding, are you not? A. I am.

“Q. Now, Mr. Nyhan, you were granted by the Chief of Police of the City and County of

San Francisco a Police Department permit No. 386, which has been introduced in evidence on a hearing in the Federal Court and is Petitioner's Exhibit No. 15 in that proceeding. Were you not granted such a permit? I will show you the permit to which I refer.

"A. Yes, I was granted it.

"Q. Referring to Permit No. 386 in the name of James P. Nyhan, California Cab Numbers 81, 82, 83, 84, 85, 86, 87 88; address 527 Woolsey Street; dated August 2nd, 1937.

"Mr. Muldary: I offer that in evidence as the Trustee's exhibit.

"The Referee: Very well; Trustee's Exhibit No. 1.

"Mr. Muldary: Q. After you were granted this permit [14] in 1937, Mr. Nyhan, did you proceed to exercise your rights under the permit by operating a number of taxicabs?

"A. Until they were repossessed, yes.

"Q. And, thereafter, did you make application to the Police Commission for permission to transfer this license or permit to your brother David Nyhan? A. Yes.

"Q. And when did you make that application? I suggest to you it was made November 10, 1941.

"A. Well, I attempted to transfer them to my brother about a week after he arrived here from the East, which I believe, was in 1939 or 1940. The Sergeant of Police in charge of the Bureau of Permits, Sergeant Trainor, would

not allow me to make the application, although I had a perfect right under the law to do so. I finally had to go to the Chief of Police himself and explain to him that I had attempted to transfer those permits a good number of times, not once, but five or six times, because my brother insisted on it. I explained to the Chief of Police, Charley Dullea; I said, "Sergeant Trainor won't even let me put in the application"; so, Dullea says, "He cannot do that; you have a right to do it." I said, "I know that; that is why I am here to see you." So, he instructed Sergeant Trainor to let me put in the application, which the Chief ruled on.

"Q. Prior to putting in such application, did you endorse the permit on the reverse side?

"A. Yes, immediately.

"Q. What did you write on the reverse side of the permit?

"A. Well, as I explained in this court before, the procedure of the Police Department—

"Q. The question, Mr. Nyhan, is what you wrote on the back [15] of the permit?

"A. I am trying to explain to you and I will get to that.

"Q. I don't care for the explanation.

"A. I would like to explain it, Your Honor.

"Mr. Nugent: We object to that on the ground that the best evidence is the permit.

"The Referee: I think that is true.

"Mr. Muldary: If the Court please, the bankrupt has testified under 21 (a) that he

endorsed the permit on the back, 'James Nyhan' and subsequently tore off the signature, so the permit is not the best evidence, that evidence having been destroyed.

"The Referee: He may testify.

"The Witness: Can I explain?

"The Referee: You may explain after.

"A. Well, that is what I want to do.

"Mr. Muldary: What I want you to do is answer the question.

"The Referee: Q. What did you endorse on it?

"The Witness: A. I endorsed it with my name, which is the procedure of the Police Department. When you transfer a permit, you go before the Bureau of Permits and endorse the back of it; they take it, put it through the regular channels and at the next hearing, it is transferred from whoever it is to the new party.

Mr. Muldary: Q. Now, in connection with this endorsement and attempted transfer of the permit to your brother, Mr. Nyhan, was an application made to the Chief of Police for permission to transfer this permit to your brother, David Nyhan?

"A. Was an application made? [16]

"Q. Was an application made?

"A. Yes, it was made, after Sergeant Trainor would not allow me to.

"Q. I will show you a document dated November 10, 1941, entitled, "Application for

Permit to Engage in Business of Operating Vehicles for Hire', which is an exhibit in the Federal Court in the bankruptcy proceeding entitled, 'Petitioner's Exhibit No. 5, February 20, 1942' and ask you if that is the application to which you refer?

"A. I imagine so. Yes, I think so.

"Q. I call your attention to the fact that it is signed, 'David Gerald Nyhan'. Is that your brother's name? A. Yes.

"Q. Is that his signature? Do you recognize it? A. Well, I don't know.

"Q. Did you see him sign it?

"A. Well, he was there. I imagine that is his.

"Mr. Torregano: The question counsel asked is, 'Did you see him sign it?'

"A. No, I didn't see him sign it. Him and I was there together. That is a long time to remember. No one else was in the room, so sure, it must be him.

"Mr. Muldary: Q. Does that appear to be his signature?

"A. It looks like his signature.

"Q. Your answer is, that is the permit to which you refer in your testimony?

"A. I believe it is.

"Q. I call your attention to the documents attached thereto, all of which are part of the same exhibit in the Federal Court, one of which is a petition for a Certificate of Public Convenience and Necessity to operate Eight

Taxicabs; another is a Certificate of Public Convenience and Necessity: [17]

“ ‘David G. Nyhan, To purchase of James P. Nyhan, California Cab Co., Nos. 81, 82, 83, 84, 85, 86, 87 and 88. (8 permits).’

Another of which is a receipt:

“ ‘Received from Bureau of Permits, permit for the operation of eight (8) taxicab permits, which was filed for the purpose of transfer, said transfer being denied November 17, 1941. Signed: James Nyhan.’

“ ‘Another of which is Notice of Decision from the Board of Permit Appeals of the City and County of San Francisco signed by C. J. Auger, President and Thos. W. McCarthy, Secretary, which says:

“ ‘The appeal of Jas. Nyhan from the order of Chas. W. Dullea, denying Appellant the right to transfer TAXICAB PERMIT TO DAVID NYHAN ON NOVEMBER 17, 1941, came on regularly for hearing before the Board of Permit Appeals December 2nd, 1941, and after such hearing the said order was CONCURRED.

Dated at San Francisco, California, December 2nd, 1941.’

“ ‘I offer that in evidence.

“ ‘The Referee: Trustee’s Exhibit No. 2.

“ ‘Mr. Muldary: Q. Now, was that application for permission to transfer these permits to your brother denied by the Police Department?’

“The Witness: A. Yes.

“Q. And when was it denied?

“A. Well, a week later, two weeks later; something like that. [18]

“Q. I call your attention to the fact that the Notice of Decision attached to the permit states that the order was made November 17, 1941. Does that refresh your memory? Do you recall whether that is it?

“A. Well, even to the Chief, generally, you make an application and it is on the calendar the next week. The Chief denied it, saying he would not transfer it to the Yellow Cab or wouldn't transfer it to David Nyhan, and then it was appealed and went to the other place up to the City Hall April first, and they took a little time too, and denied it.

“Q. This document from the Board of Permit Appeals, City and County of San Francisco, states that the application was denied on November 17, 1941. Is that your recollection?

“A. Well, I don't know. I know if that is what it says, it must be right.

“Q. And the appeal was denied December 2nd, 1941?

“A. If that what the record says, it must be right.

“Q. The petition in bankruptcy was filed on December 2nd, 1941, too?

“A. I don't know.

“Q. Now, after the denial of the transfer

of the permits, Mr. Nyhan, these documents were returned to you, were they not?

“A. Well, they were returned to me. Sergeant Trainor, as I said before, that is the first time, Your Honor, if I may say it, anybody ever had to sign a receipt for a permit, the return of a permit. It is not the usual procedure and I don’t know who instructed Sergeant Trainor to do it.

“Mr. Muldary: If Your Honor please, I don’t want to encumber the record with objections, but I ask that he be [19] instructed to answer the question.

“The Referee: Answer the question.

“Mr. Nugent: Mr. Muldary, may I see that, please?

“Mr. Muldary: Yes.

“Q. These documents, including your permit, were returned to you by the Police Department, were they not?

“The Witness: A. They were returned to my brother. He was in possession of the permit since the time he arrived from the East. Sergeant Trainor would not turn it over to anybody but the one the permits were in, James Nyhan. I was there, my brother was there. We both received it.

“Q. You gave the Bureau of Permits a receipt, which you signed, for the return of permits for the operation of eight taxicabs?

“A. Yes.

“Q. That is your signature, is it not?

“A. Yes. Which, Your Honor, is highly irregular. They never do it; I don’t know why they did it in this case.

“Mr. Dinkelspiel: We move that that go out as the opinion of the witness.

“Mr. Nugent: If Your Honor please, I deem it the right of the witness to make an explanation.

“The Referee: It is part of his explanation and may stand.

“Mr. Dinkelspiel: The trustee rests.

“Mr. Muldary: The trustee rests.

“(Trustee rests.)

“The Referee: The objection to the jurisdiction may be sustained.

“Mr. Dinkelspiel: Will Your Honor give us an opportunity to submit authorities? [20]

“The Referee: No, sir. You have rested and it is sustained.

“Mr. Nugent: Thank you, Your Honor.”

(See original of Reporter’s Transcript, handed up herewith as a part of this certificate and report.)

(The permit placed in evidence as Trustee’s Exhibit No. 1, Reporter’s Transcript, page 4, page 14 of this certificate and report, reads:

“8 15 Permits.

“Permit Number 386

Date Granted August 2, 1937

POLICE DEPARTMENT PERMIT
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

In conformity with the provisions of Ordinance No. 6979, New Series, of the City and County of San Francisco, State of California, permission is hereby granted to

Name James P. Nyhan

California Cab Co. Nos. 81, 82, 83, 84, 85, 86, 87 & 88.

Fictitious Name ~~White Cab Co. Nos. 500, 501, 502, 503, & 504.~~

Address 527 Woolsey St.

To operate vehicles for the transportation of persons for hire.

Issued by

[Seal]

CHAS. F. SKELLY.

~~THE BOARD OF POLICE~~
COMMISSIONERS
DEPUTY CHIEF OF
POLICE

Chief of Police ~~By~~.....Secretary.”)

[21]

Subsequently, and on December 11, 1942, the following formal, written order was signed and filed by me:

“The verified Petition of John O. England, the Trustee, for an Order to Show Cause di-

rected to Respondent, David Nyhan, and the verified objection of said David Nyhan to the summary jurisdiction of the Court and praying for an order quashing service of the Order to Show Cause coming on regularly for hearing this 9th day of December, 1942, and the Trustee appearing by his Attorneys, and the Respondent appearing by his Attorney, and the Trustee having offered oral and documentary evidence upon the plea to the jurisdiction of the court and thereupon having rested and thereby submitted to the court the said plea to jurisdiction for its decision, the court thereupon being fully advised, duly made its minute order sustaining said plea of said Respondent to the jurisdiction of the above entitled Court;

“It Is Hereby Ordered that pursuant to the minute order heretofore made by the above entitled court, the plea of Respondent, David Nyhan, objecting to the summary jurisdiction of the above entitled Court be, and the same is hereby sustained and service of the Order to Show Cause issued by the above entitled Court directed to said Respondent be, and the same is hereby quashed.

“Dated: the 9th day of December, 1942.

“Signed Dec. 11, 1942.

“BURTON J. WYMAN

“Referee in Bankruptcy

[22]

“APPROVAL OF ORDER AS TO FORM

“Pursuant to Rule 22 of the above entitled Court the foregoing proposed order is not approved as to form.

“Dated: Dec 11th 1942

“BEN C. MULDARY

“DINKELSPIEL &

DINKELSPIEL

“Attorneys for John O.
England, Trustee

**“REASONS FOR NOT APPROVING THE
FOREGOING PROPOSED ORDER:**

“(1) That Petitioner John O. England, Trustee, did not submit the matter to the court for its decision but rested on his affirmative and opening case;

“(2) That the court on the record could not have been fully advised as to the law and facts;

“(3) That by reason of the foregoing the court could not ‘duly’ make and enter its minute order sustaining the plea of the respondent.

“Dated: Dec 11th 1942

“BEN C. MULDARY

“DINKELSPIEL &

DINKELSPIEL

“Attys for John O. Eng-
land, Trustee”

(See original of said order, handed up herewith as a part of this certificate and report.) [23]

DISCUSSION BY AND OPINION OF REFEREE

Although the petition for review contains a number of allegations far different from, and more comprehensive than, those set forth in the trustee's petition, which, with the order to show cause and the plea to the court's jurisdiction, was before the court on December 9, 1942, the date of the complained-of order, it is solely with the averments contained in the trustee's last mentioned petition and the attempted proof of said averments, particularly as regards possession of the license, that the court was called upon to deal when said order was made.

Boiled down to its essence, the vital proof which the trustee was bound to make in order to establish jurisdiction in the bankruptcy court, over the adverse claimant's, David Nyhan's objection, was that, at the time of the filing of the petition in bankruptcy, the license in controversy was in the actual or constructive possession of the bankrupt. As was said in *Taubel-Scott-Kitzmiller Co., Inc. v. Fox*, 264 U. S. 426, 432, 433 44 S. Ct. 396, 398, 399, 68 L. Ed. 770, 774, "Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was

thereafter wrongfully withdrawn from his custody; where the property is in hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, [24] but the claim is colorable* only."

What are the trustee's allegations as regards pos-

*See *In re Western Rope & Mfg. Co.*, (C.C.A. 8) 298 F. 926, [affirmed on certiorari, *Harrison v. Chamberlin*, 271 U.S. 191, 46 S. Ct. 467, 70 L. Ed. 897.], in which, at page 927, the Circuit Court said, as it will might be in the instant matter, "We think the Mueller Case and quite a few other cases before the various Courts of Appeals have established the doctrine that where the claim alleged to be adverse is not really so, but only colorably such, that the bankruptcy court has jurisdiction to determine the character of the claim in that respect and, if it is colorable only, to adjudicate the merits of the matter in a summary manner. The application of this rule involves a definition of what is meant by colorable. In our judgment, the meaning of that word as used in this connection is that a claim alleged to be adverse is only colorably so when, admitting the facts to be as alleged by the claimant, there is, as matter of law, no adverse-ness in the claim.

"Measured by the above standard, we cannot say that this claim is merely colorable. . . . However improbable or even fraudulent this claim may be, yet that matter has no bearing upon determination of jurisdiction, but is pertinent only on the merits in the court properly having jurisdiction of the controversy. For the purposes of determining whether this claim is merely colorable, we think we must take it that the above circumstances would be shown and might be found to be true. In that view of the matter, we cannot say as matter of law, that there is no merit to the claim."

session? They are found on page 2 of his petition, commencing with line 19 and ending on line 23, (pages 6 and 7 of this certificate and report). They read:

“That said Respondent David Nyhan and Respondent bankrupt herein have joint possession and control of said above-described taxi license, and that Respondent David Nyhan now holds possession of said taxi license as agent and or trustee for said Respondent bankrupt.”

What, in effect, is the proof offered in support of said allegations? That, according to James Nyhan, the bankrupt, the sole witness called on behalf of the trustee in justification of the jurisdiction of this court, said witness had attempted to transfer the permits to his brother, David Nyhan, about a week after said brother had arrived here from the East, which, the witness believed, was in 1939 or 1940; that the witness had attempted to [25] transfer said permit five or six times because his brother has insisted on it. (Page 4 of Reporter's Transcript, page 15 of this certificate and report.)

The following question also was asked and the following answer also was given by said witness on *direction* examination:

“Q. These documents, including your permit, were returned to you by the Police Department, were they not?”

“The Witness: A. They were returned to my brother. He was in possession of the permit since the time he arrived from the East. Sergeant Trainor would not turn it over to any-

one but the one the permits were in, James Nyhan. I was there, my brother was there. We both received it.”

(Reporter’s Transcript, page 9, page 20 of this certificate and report.)

Unquestionably, in the absence of any objection, or assertion of an adverse claim on the part of David Nyhan, the court legally would have been entitled to hold that the bankrupt’s joint possession was sufficient, under the law, to enable the court to pass upon, in a summary proceeding, David Nyhan’s interest, if any, in the permit, or license, in controversy. The court, however, could not overlook the statements made, under oath, by David Nyhan in his verified plea to the court’s jurisdiction, i.e., “That before the petition in involuntary bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, the Respondent, David Nyhan, was and now is the [26] owner and entitled to possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California and mentioned in the Trustee’s Petition.

“Any interest of the Bankrupt, James Nyhan, by reason of the issuance thereof in said Bankrupt’s name in said taxi license is held in trust by said Bankrupt for Respondent, David Nyhan.

“Respondent further alleges that the said Bankrupt, James Nyhan, has no ownership in said taxi license nor the possession thereof, and that said

taxi license at no time was and not now is a part of the assets of said bankrupt's estate."

(Page 3 of said verified plea, page 11 of this certificate and report.)

If it be assumed that ordinarily the joint possession of the bankrupt, even with an adverse claimant, would justify the court in proceeding summarily, that rule could not be applied herein, in the first instance, and in my opinion, cannot be applied by the District Court, sitting as an appellate tribunal, for the reason that David Nyhan, having set up his adverse claim to the effect that said bankrupt is said David Nyhan's agent, trustee or bailee, the court is bound by the rule that where one holds possession under the conditions claimed by David Nyhan, that the possession of the bankrupt is the possession of David Nyhan, and hence the court is without jurisdiction in a summary proceeding to deal with the adverse claimant's purported interest in the license in question.

See *Sproul v. Levin*, (C.C.A. 8) 88 F. (2d) 866.

But, so may run the argument of counsel seeking a review of the complained-of order, the District Court, in view of its order adjudicating James Nyhan a bankrupt, which is based on a finding to the effect that the said license was transferred from [27] said bankrupt to said David Nyhan in fraud of creditors, is bound to apply the rule of *res adjudicata*, so far as the title to said license

is concerned. Regardless of said finding, however, the last mentioned rule seemingly cannot be made applicable to the proceeding now under consideration for the all-important reason that this proceeding, so far as David Nyhan is concerned, does not deal with the rights and privileges of the bankrupt, but does deal with the rights and privileges of said brother, David Nyhan, who was not a party to the proceeding wherein James Nyhan was adjudged a bankrupt. "It is well settled," said the court in *Lyon v. Perin Manufacturing Co.*, 125 U. S. 698, 700 8 S Ct. 1024, 1025, 31 L. Ed. 839, 840, 841, "that, in order to render a matter res adjudicata, there must be a concurrence of the four conditions, viz.: (1) Identity in the thing *sue* for; (2) Identity of cause of action; (3) Identity of persons and parties to the action; and (4) Identity of the quality in the persons for or against whom the claim is made." The last mentioned rule is followed strictly in this circuit. *Schodde v. United States*, (C.C.A. 9) 69 F. (2d) 866, 869, 870.

It further may be argued in contending that the petition for review should be granted, that inasmuch as the court, before entering the order adjudicating James Nyhan a bankrupt found a transfer of the license in question had been made to David Nyhan in fraud of creditors of said bankrupt, David Nyhan the adverse claimant cannot be heard to complain in a proceeding which, summarily without his consent, would deprive him of the right to have his claim determined in a

plenary proceeding. This, however, in my opinion, is not the law. According to my interpretation, “. . . a claim may be adverse and substantial, even though in fact fraudulent and voidable.” Such is held *In re Bastanchury Corporation, Ltd.*, (C.C.A. 9) 62 F. (2d) 537, 542. [28]

See, also, *Mueller v. Nugent*, 184 U. S. 1, 15, 22 S Ct. 269, 275, 46 L. Ed. 405, 412, and *In re Yorkville Coal Co.*, (C.C.A. 2) 211 F. 619 622, in which, in the latter case, it is said, “Whether the facts are true or fraudulent or false or fictitious, it cannot be determined without the claimant’s consent. It is the claimant’s right to have the truth of the testimony and the merits of the claim determined, if he so prefers, in a plenary suit.”

On behalf of the trustee, as shown by the notations at the bottom of the written order sustaining the plea to the jurisdiction, (page 2 of said order), complaint is made that because the trustee “did not submit the matter to the court for its decision but rested on his affirmative and opening case; . . . the court on the record could not have been fully advised as to the law and facts,” and hence “could not ‘duly’ make and enter its minute order sustaining the plea of the respondent” (*David Nyhan*).

It is quite evident that what seemingly is overlooked in this contention is the vital factor that the court must decline jurisdiction as soon as the substantiality of the adverse claimant’s claim is made to appear, and in this proceeding that sub-

stantiality appeared as soon as David Nyhan's verified plea to the jurisdiction was placed before the court, and the trustee had ceased to present further testimony to show the jurisdiction in this court, so far as was, and is, concerned the summary determination of the rights of David Nyhan.

See *Benjamin v. Central Trust Co.*, (C.C.A. 7) 216 F. 887, 888, 889, wherein it is said, “. . . substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer, which is unmet by the trustee, or which, if met by replication, is supported by sworn testimony of facts which, if true, would show title and possession antedating the petition in bankruptcy.” [29]

In connection with the complaint made on behalf of the trustee that the matter was not submitted for decision, it is to be noted that the denied request only was that counsel for said trustee be given an opportunity to submit authorities.

(Reporter's Transcript, page 9, page 20 of this certificate and report.)

No suggestion whatever was given that further evidence would be offered on the trustee's behalf. Unfortunately for the trustee, on the state of the record, had a request been made to present further testimony, under the rule existent in the Ninth Circuit, I legally would have been compelled to deny the request, because, at the time of the request to supply authorities even, I orally had made, and in writing had entered in my min-

ute book, the order sustaining the plea to the jurisdiction. Under the circumstances, the entry of such order was final, so far as my power as referee was, and is, concerned, i.e., I could not have changed the entered order had I felt inclined to do so.

See *In re Lyders*, (D.C., N.D., Calif.) 16 F. Supp. 213, 214, 215, [undisturbed on appeal in *Lyders v. Petersen* (C.C.A. 9) 88 F. (2d) 9], and *In re Faerstein*, (C.C.A. 9) 58 F. (2d) 942, the court in the latter case, at page 943, having declared, "When an order is entered, the referee's power over the order is ended. The remedy is exclusive and he may not review or change the order. *In re Russell* (D.C.) 105 F. 501; *In re Wister & Co.* (D.C.) 232 F. 898; also, *In re Greek Mfg. Co.* (D.C.) 164 F. 211; *In re Marks* (D.C.) 171 F. 281; *In re Avoca Silk Co.* (D.C.) 241 F. 607; *Matter of J. W. Renshaw's Sons, Bankrupt* (D.C.) 3 F. (2d) 75; *Matter of Wm. L. David* (C.C.A.) 33 F. (2d) 748; *David v. Hubbard*, 280 U. S. 514, 50 S. Ct. 19, 74 L. Ed. 585." [30]

Assuming, without expressing an opinion, either pro or contra as to such procedure, that even as against David Nyhan, claiming adversely to the bankrupt's estate, the court in the first instant might have looked, and the District Court, as an appellate tribunal, may look, to the record as to the bankrupt's title to said license, the question relative to the title thereto is not necessary to be considered in connection with the complained-of order, for the pertinent reason that where the court's jurisdiction to proceed summarily is in-

volved, “. . . the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy,” as was said in *Thompson v. Magnolia Co.*, 309 U. S. 478, 481, 60 S. Ct. 628, 630, 84 L. Ed. 876, 880. Reverting to the proceeding of December 9, 1942, what had been proved on behalf of the trustee at the time the complained-of minute order was entered was either one of two things: (1) Positively, that at the time the petition to adjudged James Nyhan a bankrupt was filed, David Nyhan, and not the bankrupt, was in possession of the license, or (2) Negatively, that the license was not in the possession of the bankrupt at the time of the filing of the original petition in bankruptcy.

Such being the case, when the order which is sought to be reviewed was entered, from the mouth of the trustee's own witness had come the words that definitely and unqualifiedly showed that the court, upon the record presented, on December 9, 1942, was without jurisdiction to proceed against David Nyhan, regardless of its power over the bankrupt and his estate.

If, as the trustee claims, this license be a part of the bankrupt's estate, whose title thereto is good, even as against the claim of David Nyhan, the questioned order does nothing, except to say that the trustee must proceed against David Nyhan in a forum [31] in which the decisions of the higher federal courts have declared to be proper and, in this instance, the bankruptcy court, in my opinion, is not such a forum, as was, and is, evidenced by the order now sought to be reviewed.

PAPERS HANDED UP HEREWITH

The following papers are handed up herewith as a part of this certificate and report:

(1) Petition for Review of Referee's Order Sustaining Plea to Jurisdiction and Quashing Order to Show Cause;

(2) Trustee's Petition for Order Authorizing Sale of Personal Property and Temporary Restraining Order Thereon;

(3) Order to Show Cause;

(4) Verified Plea of Respondent David Nyhan Objecting to the Summary Jurisdiction of the Above Entitled Court and for an Order Quashing Service of Order to Show Cause Directed to Said Respondent as Issued by the Above Entitled Court;

(5) Reporter's Transcript of Hearing on Order to Show Cause Against David Nyhan, and

(6) Order Sustaining Plea to Jurisdiction and Quashing of Order to Show Cause.

Dated: January 28th, 1943.

Respectfully submitted,

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed Jan. 28, 1943. [32]

[Title of District Court and Cause.]

TRUSTEE'S PETITION FOR ORDER AUTHORIZING SALE OF PERSONAL PROPERTY AND TEMPORARY RESTRAINING ORDER THEREON.

Comes now John O. England, and respectfully represents:

That on or about the 17th day of November, 1941, an involuntary petition in bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, against Respondent James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, and that thereafter such proceedings were had that on or about the 11th day of June, 1942, said James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, was duly adjudged to be a bankrupt in accordance with the provision of the Acts of Congress relating to bankruptcy, and that thereafter and on or about the 20th day of August, 1942, your petitioner was [33] duly appointed as Trustee of said bankrupt's estate, and thereupon duly qualified as, and has since been and now is the duly appointed and acting Trustee of the estate of the above-named bankrupt.

That your petitioner is informed, believes, and therefore represents that on and before said 11th day of November, 1941, at the time said petition in bankruptcy was filed in said district as aforesaid, the above-named bankrupt was the owner of and

entitled to the possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California, under and by virtue of the Ordinances of said City and County of San Francisco, authorizing and permitting said bankrupt to operate eight taxi cabs for hire on the streets of said City and County and State, naming James Nyhan, doing business as "California Cab Co." as licensee.

That your petitioner is informed, believes, and therefore represents, that Respondent David Nyhan, claims an interest in said above-described taxi license but that as a matter of fact, has no such interest in law or equity.

That said Respondent David Nyhan and Respondent bankrupt herein have joint possession and control of said above-described taxi license, and that Respondent David Nyhan now holds possession of said taxi license as agent and or trustee for said Respondent bankrupt.

That by reason of the premises your petitioner is informed, verily believes, and therefore represents, that the said personal property was, at all times herein mentioned and still is, a part of the assets of the estate of said bankrupt and subject to administration herein as part of said estate.

That your petitioner represents that unless this Honorable Court enter its temporary restraining order herein forbidding any [34] transfer or encumbrance of that certain personal property above-

described by the said Respondent, until this matter is finally determined by this Court, that said personal property will be forever lost to this bankrupt estate.

Wherefore, your petitioner prays for an Order authorizing and directing him as Trustee, to administer upon and to sell, in the manner prescribed by law, said above-described taxi license, as part of the assets of the estate of the bankrupt above-named free and clear of any property liens, claim, right, title, or interest of said Respondents; and that pending the hearing of this petition and until this matter is finally determined by this Court the Respondents, and each of them, be restrained from transferring or encumbering said personal property and for such other and further Order and or relief as may be meet and proper in the premises.

Dated: This 10th day of November, 1942.

JOHN O. ENGLAND

Trustee

DINKELSPIEL & DINKEL-
SPIEL

Attorneys for Trustee [35]

United States of America

State of California

City and County of San Francisco—ss.

John O. England, being first duly sworn, deposes and says: that he is the Trustee in the foregoing Bankruptcy proceedings and the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof; that the same

is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

JOHN O. ENGLAND

Subscribed and sworn to before me this 10th day of November, 1942.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed with Referee Nov 10 1942.

[Endorsed]: Filed with Clerk Jan 28 1943. [36]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE.

Upon consideration of the annexed duly verified petition of John O. England, Trustee herein, for an Order authorizing the sale of personal property and good cause appearing therefor, now on motion of Messrs. Dinkelspiel & Dinkelspiel, Attorneys for said Trustee herein, it is hereby

Ordered, that James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, and David Nyhan, and each of them, do personally be and appear before the undersigned Referee in Bankruptcy at the office of Burton J. Wyman, Room 604, Grant Building at San Francisco, California, in said District, at the hour of 2:00 o'clock P. M. on the 17th day of November, 1942, then and there to show cause, if any,

or each of them and why the prayer of said annexed Trustee's petition [37] should not be granted; and it is further

Ordered, pending the hearing of this Order to show cause and until further ordered of this Court, the Respondents and each of them, are hereby restrained from in any way selling, transferring, or encumbering the personal property described in said annexed petition; and it is further

Ordered, that service of this Order be made by delivering to said Respondents, and each of them, a duly certified copy of this Order, together with a true copy of said annexed Trustee's Petition, at least 2 days prior to the aforesaid hearing hereof.

Dated: This 10 day of November, 1942.

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed] Filed with Referee Nov 10 1942

[Endorsed] Filed with Clerk Jan 28 1943 [38]

[Title of District Court and Cause.]

VERIFIED PLEA OF RESPONDENT DAVID
NYHAN OBJECTING TO THE SUMMARY
JURISDICTION OF THE ABOVE ENTI-
TLED COURT AND FOR AN ORDER
QUASHING SERVICE OF ORDER TO
SHOW CAUSE DIRECTED TO SAID RE-
SPONDENT AS ISSUED BY THE ABOVE
ENTITLED COURT

To the Honorable, the Judges of the United States
District Court for the Northern District of Cali-
fornia, and to Honorable Burton J. Wyman,
Referee in Bankruptcy for said Court at San
Francisco, California:

Now comes, David Nyhan, of the City and County
of San Francisco, State and District aforesaid, Re-
spondent to an order to show cause issued by the
above entitled Court on the 11th day of November,
1942 and returnable on the 2nd day of December,
1942 and continued until December 9, 1942, and
appearing specially and not otherwise for the pur-
pose of objecting to the summary jurisdiction of
the above entitled court and moving said court for
an order quashing the service of said order to show
cause, and for grounds of his plea objecting to the
jurisdiction of the above entitled court alleges: [39]

1. That it affirmatively appears from the petition
of the Trustee, John O. England, upon which said
order to show cause was issued by the above entitled
court, that the above entitled court was and is with-
out jurisdiction to hear and determine the matters

therein stated or to make any order against the respondent therein named except by consent of this respondent, and that this respondent has never consented to submit himself to the jurisdiction of the above entitled court, but, on the contrary, this respondent has declined and does decline to submit himself to the jurisdiction of the above entitled court to hear and determine any of the matters set forth in said Trustee's petition or be subjected to any orders of the above entitled court pertaining to any of the matters set forth in said Trustee's petition.

2. That it affirmatively appears from the face of said Trustee's petition and the order to show cause issued by the above entitled court, that the facts stated in said Trustee's petition do not confer upon the above entitled court summary jurisdiction over said respondent without his consent.

3. That it affirmatively appears from said trustee's petition, upon which said order to show cause was issued, and from said order to show cause, that the issues which the Trustee seeks to submit to the above entitled court as grounds for the granting of the prayer of said petition can only be determined in a plenary action and not in a summary proceeding instituted by said Trustee herein, and it affirmatively appears from said petition that no summary jurisdiction can be exercised by the above entitled court as it relates to this respondent, without the consent of this respondent.

That this respondent is entitled to have said issue determined in a plenary action and to have a trial

by jury of the [40] issues raised in said petition pursuant to his demand.

For a further, separate and distinct objection to the summary jurisdiction of the above entitled court, this respondent alleges as follows, to-wit:

That before the petition in involuntary bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, the Respondent, David Nyhan, was and now is the owner and entitled to possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California and mentioned in the Trustee's Petition.

Any interest of the Bankrupt, James Nyhan, by reason of the issuance thereof in said Bankrupt's name in said taxi license is held in trust by said Bankrupt for respondent, David Nyhan.

Respondent further alleges that the said Bankrupt, James Nyhan, has no ownership in said taxi license nor the possession thereof, and that said taxi license at no time was and not now is a part of the assets of said bankrupt's estate.

Respondent alleges that any order granting the prayer of the Trustee herein would be in excess of the jurisdiction of the above entitled Court.

Wherefore, Respondent prays that service of the Order to show cause issued by the above entitled Court may be ordered quashed on account of lack

of jurisdiction of the above entitled Court to have issued said order to show cause.

DAVID NYHAN

Respondent

(Duly Verified.) [41]

Receipt of a copy of the within Verified Plea of Respondent is hereby admitted this 5th day of December, 1942.

BEN O. MULDARY

DINKELSPIEL &

DINKELSPIEL

Attorneys for Trustee, John
O. England

[Endorsed] Filed with Referee Dec 5 1942.

[Sndorsed] Filed with Clerk Jan 28 1943. [42]

[Title of District Court and Cause]

ORDER SUSTAINING PLEA TO JURISDICTION AND QUASHING OF ORDER TO SHOW CAUSE

The verified Petition of John O. England, the Trustee, for an Order to Show Cause directed to Respondent, David Nyhan, and the verified objection of said David Nyhan to the summary jurisdiction of the Court and praying for an order quashing service of the Order to Show Cause coming on regularly for hearing this 9th day of December, 1942, and the Trustee appearing by his Attorneys, and the Respondent appearing by his Attorney,

and the Trustee having offered oral and documentary evidence upon the plea to the jurisdiction of the court and thereupon having rested and thereby submitted to the court the said plea to jurisdiction for its decision, the court thereupon being fully advised, duly made its minute order sustaining said plea of said Respondent to the jurisdiction of the above entitled Court;

It Is Hereby Ordered that pursuant to the minute order heretofore made by the above entitled court, the plea of Respondent, David Nyhan, objecting to the summary jurisdiction of the above entitled Court be, and the same is hereby sustained and service of the Order to Show Cause issued by the above entitled Court directed to said Respondent be, and the same is hereby quashed.

Dated: the 9th day of December, 1942.

Signed Dec. 11, 1942.

BURTON J. WYMAN

Referee in Bankruptcy

[43]

APPROVAL OF ORDER AS TO FORM

Pursuant to Rule 22 of the above entitled Court the foregoing proposed order is not approved as to form.

Dated: Dec 11th 1942

BEN C. MULDARY

DINKELSPIEL & DINKEL-
SPIEL

Attorneys for John O. Eng-
land, Trustee

REASONS FOR NOT APPROVING THE
FOREGOING PROPOSED ORDER:

(1) That Petitioner John O. England, Trustee, did not submit the matter to the court for its decision but rested on his affirmative and opening case;

(2) That the court on the record could not have been fully advised as to the law and facts;

(3) That by reason of the foregoing the court could not "duly" make and enter its minute order sustaining the plea of the respondent.

Dated: Dec 11th 1942

BEN C. MULDARY
DINKELSPIEL & DINKEL-
SPIEL

Attorneys for John O. Eng-
land, Trustee

[Endorsed]: Filed with Referee Dec 11 1942

[Endorsed]: Filed with Clerk Jan 28 1943 [44]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER SUSTAINING PLEA TO JURIS-
DICTION AND QUASHING ORDER TO
SHOW CAUSE

To the Honorable Burton J. Wyman, Referee in
Bankruptcy:

The petition of John O. England respectfully shows :

1. That your petitioner is the duly elected, qualified and acting Trustee of the above named bankrupt;

2. That heretofore and on the 10th day of November, 1942, your petitioner filed herein a verified petition for an order authorizing your petitioner to sell a certain taxi license or permit standing in the name of the above named bankrupt permitting the holder of said taxi license or permit to operate eight taxicabs in the City and County of San Francisco, State of California, free and clear of any claim of David Nyhan, [45] alias, and an order to show cause issued thereon and served on said David Nyhan, which order to show cause and petition was returnable before the above entitled court on the 2nd day of December, 1942, and was duly and regularly continued from said date for hearing to the 9th day of December, 1942, and that said respondent David Nyhan served and filed his answer objecting to the summary jurisdiction of the above entitled court and requesting an order quashing service of the order to show cause;

That thereupon a minute order was entered on the 9th day of December, 1942, sustaining the plea of the jurisdiction and quashing the order to show cause, and that thereafter, on the 11th day of December, 1942, an order was entered sustaining the plea to the jurisdiction and quashing the order to show cause, in words and figures as follows :

“In the District Court of the United States for
the Northern District of California, South-
ern Division

No. 34467 R

In the Matter of James Nyhan, also known as
James P. Nyhan, also known as James Paul
Nyhan, also known as Dick Nyhan,
Bankrupt.

ORDER SUSTAINING PLEA TO JURIS-
DICTION AND QUASHING OF OR-
DER TO SHOW CAUSE

The verified Petition of John O. England, the Trustee, for an Order to Show Cause directed to Respondent, David Nyhan, and the verified objection of said David Nyhan to the summary jurisdiction of the Court and praying for an order quashing service of the Order to Show Cause coming on regularly for hearing this 9th day of December, 1942, and the Trustee appearing by his attorneys, and the respondent appearing by his attorney, and the Trustee having offered oral and documentary evidence upon the plea to the jurisdiction of the court and thereupon having rested and thereby submitted to the court the said plea to jurisdiction for its decision, the court thereupon being fully advised, duly made its minute order sustaining said [46] plea of said respondent to the jurisdiction of the above entitled Court;

It Is Hereby Ordered that pursuant to the minute order heretofore made by the above entitled court, the plea of respondent, David Nyhan, objecting to the summary jurisdiction of the above entitled Court be, and the same is hereby sustained and service of the Order to Show Cause issued by the above entitled Court directed to said respondent be, and the same is hereby quashed.

Dated: the 11th day of December, 1942.

BURTON J. WYMAN

Referee in Bankruptcy”

That said order is erroneous for the following reasons:

That said order is contrary to the facts and law in that the uncontroverted evidence shows that prior to the filing of the petition in bankruptcy, which said petition was filed on November 17, 1941, said bankrupt attempted to assign and transfer said taxi license or permit to his brother David Nyhan, alias, said respondent; that under the provisions of the ordinances of the City and County of San Francisco, said license is transferable only with the consent of the Police Commission of said City and County, and that upon the 10th day of November, 1941, an application was made by respondent David Nyhan, alias, and said bankrupt pursuant to said municipal ordinance of the said City and County of San Francisco, to the Chief of Police and the Police Commission of said City and County for an order permitting said transfer and assign-

ment of said permit, and the certificate for said permit was filed with said Chief of Police of said City and County with said application;

That thereafter and subsequent to the filing of the [47] petition in bankruptcy said Chief of Police and Police Commission denied and refused to permit the transfer of said taxi permit and license and that the same was redelivered by said Chief of Police to said bankrupt and his receipt obtained therefor;

That thereafter an appeal was taken by said David Nyhan, alias, said respondent and said bankrupt to the Board of Permit Appeals of the City and County of San Francisco, which said board thereafter sustained said ruling denying the transfer of said permit;

That the Referee's order on the foregoing facts denying jurisdiction for the summary order requested by the trustee to sell free and clear of any claim of David Nyhan, alias, said respondent, is contrary to the law in that said taxi permit or license at the time of the filing of the petition in bankruptcy was in the possession of the bankrupt and was an asset of the estate and therefore subject to the summary jurisdiction of the Referee;

That the order of the Referee sustaining the objections to the summary jurisdiction of the Referee, cannot be sustained in law on the evidence adduced.

Wherefore, your petitioner prays for a review of the said order by the Judge of this Honorable Court, and that said order be vacated and set aside,

and that the Referee be directed to enter an order denying the plea of the respondent to the jurisdiction of the Referee, and to decide the controversy on its merits and in accordance with the facts and law.

B. H. MULDARY
DINKELSPIEL & DINKEL-
SPIEL

Attorneys for Trustee.

JOHN O. ENGLAND

Petitioner. [48]

(Duly Verified.)

[Endorsed]: Filed with Referee Dec. 17, 1942.

[Endorsed]: Filed with Clerk Jan. 28, 1943. [49]

In the Southern Division of the United States
District Court of the Northern District of
California

No. 34467-R

In the Matter of

JAMES NYHAN, also known as JAMES P.
NYHAN, also known as JAMES PAUL
NYHAN, also known as DICK NYHAN,
Bankrupt.

IN BANKRUPTCY

ORDER AFFIRMING REFEREE'S ORDER

The petition of John O. England, Trustee, for review of the Referee's Order entered in the above

matter on December 11, 1942, wherein the Respondent, David Nyhan's plea to the jurisdiction of the court was sustained and service of the order to show cause directed to said respondent was quashed, having been heretofore heard and submitted and the same being now fully considered it is by the Court Ordered that the aforesaid Order of the Referee be and the same is hereby Affirmed.

Dated: March 15, 1943.

MICHAEL J. ROCHE

United States District Judge

[Endorsed]: Filed Mar. 15, 1943. [50]

[Title of District Court and Cause.]

No. 34467-R

IN BANKRUPTCY

NOTICE OF APPEAL

Notice Is Hereby Given, that John O. England, trustee in bankruptcy of James Nyhan, bankrupt above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered by the Honorable Michael J. Roche, Judge of the United States District Court for the Northern District of California, Southern Division, on the 15th day of March, 1943, affirming the order and decision of the Honorable Burton J. Wyman, one of the Referees in Bankruptcy of said court, made and entered on the 11th day of Decem-

ber, 1943, sustained the objection of David Nyhan, respondent therein, to the summary jurisdiction of the United States District Court for the Northern District of California, Southern [51] Division thereof, and quashing service of the order to show cause theretofore served upon the said David Nyhan, upon the petition of John O. England, said trustee in bankruptcy, for an order of sale of certain taxi permits or licenses, free and clear of any lien of David Nyhan, said respondent.

Dated April 2nd, 1943.

DINKELSPIEL & DINKEL-
SPIEL

B. H. MULDARY

Attorneys for Appellant John
O. England, Trustee in
Bankruptcy

[Endorsed]: Filed Apr. 2, 1943. [52]

[Title of District Court and Cause.]

NOTICE OF FILING DESIGNATION OF
PORTIONS OF RECORD, PROCEEDINGS
AND EVIDENCE TO BE RELIED ON
UPON APPEAL

To David Nyhan, and to Bernard Nugent, Esq., his attorney, 550 Montgomery Street, San Francisco, California, and to James Nyhan, Bankrupt, and to Ernest J. Torregano, Esq., his attorney, Mills Building, San Francisco, California.

You and Each of You Will Please Take Notice, that on 2nd day April, 1943, the undersigned Attorneys for Appellant in the above entitled proceedings filed with the Clerk of the United States District Court for the Northern District of California, Southern Division, their designation of portions of the record, proceedings and evidence and statement of points to be relied upon on appeal under Rule 75, a [56] copy of which is annexed hereto and served herewith.

DINKELSPIEL & DINKEL-
SPIEL

B. H. MULDARY

Attorneys for Appellant John
O. England, Trustee in
Bankruptcy

Receipt of the foregoing Notice and service of a copy of the accompanying Designation of portions of record, and statement of points to be relied upon on appeal under Rule 75, and Notice of Appeal is hereby acknowledged this 3rd day of April, 1943.

BERNARD NUGENT

Attorney for David Nyhan
TORREGANO & STARK
ERNET J. TORREGANO

Attorneys for James Nyhan,
said bankrupt.

[Endorsed]: Filed Apr. 6, 1943. [57]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD AND STATEMENTS
OF POINTS TO BE RELIED UPON ON
APPEAL UNDER RULE 75

Comes now John O. England, trustee in bank-
ruptcy of James Nyhan, alias, appellant herein,
and hereby designates as the part of the record
which he deems necessary for the consideration of
such appeal, the following:

1. The certificate and report of the Referee on
petition for review of the Referee's Order sustain-
ing plea to jurisdiction and quashing order to show
cause, which certificate and report of the Referee
includes the following:

(a) The petition of John O. England for an
order to show cause why he should not sell cer-
tain taxi licenses or permits free and clear of
any lien or claim of David Nyhan, respondent
therein, filed November 10, 1942; [53]

(b) The order to show cause issued thereon,
dated November 10, 1942;

(c) The answer of respondent David Nyhan
denying summary jurisdiction in the United
States District Court dated December 5, 1942;

(d) The transcript of testimony taken be-
fore the Honorable Burton J. Wyman, said
Referee in Bankruptcy, with exhibits appended
thereto, including the application to transfer
license from James Nyhan, said bankrupt, to
David Nyhan, the license from the Chief of

Police of the City and County of San Francisco to James Nyhan, and the denial of the application to transfer said license, Police Code, Section 1079, of the City and County of San Francisco, State of California.

(e) The Referee's Order sustaining the plea of the respondent, David Nyhan, to the summary jurisdiction of the United States District Court and quashing the order to show cause theretofore issued.

(f) The petition for review of John O. England, trustee in bankruptcy of James Nyhan, alias, dated Dec. 17, 1942.

(g) Discussion by and opinion of Referee.

2. The order affirming the decision and order of the Honorable Burton J. Wyman, made and entered by the Honorable Michael J. Roche, Judge of the United States District Court of Appeals on the 15th day of March, 1943, being the order appealed from.

3. Notice of Appeal.

4. This designation and notice of filing thereof.

5. Statement of points and notice of filing same.

STATEMENT OF POINTS TO BE RELIED
UPON UNDER RULE 75, SUBSECTION
(d).

That the order of the District Judge appealed from affirming the Referee's order denying jurisdiction for the summary order requested by the Trustee is:

1. Contrary to law;

2. Not sustainable under the facts presented;

That the order of the United States District Court [54] affirming the order of the Referee sustaining objections to the summary jurisdiction, is in error on the law and the facts.

Dated April 2nd, 1943.

DINKELSPIEL & DINKEL-
SPIEL

B. H. MULDARY

Attorneys for Appellant

[Endorsed]: Filed Apr. 2, 1943. [55]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 57, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of James Nyhan, etc., Bankrupt, No. 34467 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Eight 55/100 Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 6th day of May, A. D. 1943.

[Seal]

WALTER B. MALING

Clerk

E. H. NORMAN

Deputy Clerk

[Endorsed]: No. 10424. United States Circuit Court of Appeals for the Ninth Circuit. John O. England, Trustee of the Estate of James Nyhan, Bankrupt, Appellant, vs. David Nyhan, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 6, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10424

In the Matter of

JAMES NYHAN, also known as JAMES P.
NYHAN, also known as JAMES PAUL
NYHAN, also known as DICK NYHAN,
Bankrupt.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANTS ON
APPEAL UNDER RULE 19 (6)

Comes now John O. England, Trustee in Bankruptcy of James Nyhan, alias, appellant herein, and specifies the following as a concise statement of points on which he intends to rely on his appeal herein.

That the order of the District Court appealed from affirming the Referee's order sustaining respondent David Nyhan's plea to the summary jurisdiction of the bankruptcy court and quashing the order to show cause, was and is erroneous, contrary to law, and not sustainable under the facts presented, in that:

(a) The District Court held that where a municipal ordinance provided that no taxi permit could be transferred or assigned by the owner and holder thereof without an application to the Chief of Police, and the granting of a permit for such transfer by the Chief of Police, and where the Chief of

Police had denied, prior to bankruptcy, an attempted transfer and assignment of such license from the bankrupt to the respondent David Nyhan, that such alleged transferee had a sufficient claim to the license or permit to defeat the summary jurisdiction of the District Court and to refuse an order of sale of said license or permit to the trustee in bankruptcy free and clear of the lien or claim of said transferee.

(b) The District Court held that the attempted transfer and assignment of the taxi license or permit by the bankrupt to David Nyhan, notwithstanding the provisions of the ordinance of the City and County of San Francisco requiring the consent of the Chief of Police to such transfer, which consent was denied, created an equitable claim or lien in the transferee sufficient to defeat the summary jurisdiction of the District Court.

(c) The District Court refused to take summary jurisdiction to make an order of sale free of the claim of David Nyhan, respondent and appellee herein, where the application to transfer the license had been denied by the Chief of Police, and at the date of the bankruptcy the license still stood in the name of the bankrupt.

(d) The District Court held that the paper evidencing the license or permit was in the possession of the transferee at the time of the filing of the petition in bankruptcy, and disregarded the fact that the license or permit is an inchoate right and that the paper on which the license was printed was valueless to the transferee, David Nyhan, re-

spondent and appellee herein, and gave him no rights therein without the consent to transfer of the Chief of Police.

(e) The Referee and the District Court erred in failing to find and decide that the court had summary jurisdiction of the property in question, to-wit, the taxicab license or permit, and of David Nyhan's claim thereto for the reason that all rights and privileges incident to said license or permit remained in the bankrupt at the date of adjudication and that the attempted transfer thereof or of the certificate evidencing the same to David Nyhan prior to bankruptcy was of no effect as the required consent of the Police Commission of the City and County of San Francisco to such transfer had not been obtained or was denied at the time of said adjudication.

Dated at San Francisco, California, this 13th day of May, 1943.

Respectfully submitted,

B. H. MULDARY,

DINKELSPIEL & DINKEL-
SPIEL

By MARTIN J. DINKELSPIEL

Attorneys for Appellant

Received a copy of the foregoing Designation of Parts of Record Necessary for the Consideration of Appeal Under Rule 19 (6), and Concise Statement of Points To Be Relied Upon By Appellants

on Appeal Under Rule 19 (6) this 13th day of May, 1943.

BERNARD NUGENT

Attorneys for Appellees

[Endorsed]: Filed May 13, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION OF APPEAL UNDER RULE 19(6)

Comes now John O. England, Trustee in Bankruptcy of James Nyhan, alias, appellant herein, and hereby designates as the parts of the record which he thinks necessary for the consideration of such appeal, the entire record as contained in the transcript of said record on appeal heretofore transmitted to the Clerk of the above-entitled court by the Clerk of the United States District Court for the Northern District of California, Southern Division.

Dated at San Francisco, California, this 13th day of May, 1943.

Respectfully submitted,
 B. H. MULDARY,
 DINKELSPIEL & DINKEL-
 SPIEL

By MARTIN J. DINKELSPIEL
 Attorneys for Appellants

[Endorsed]: Filed May 13, 1943. Paul P. O'Brien, Clerk.